SERVED: February 14, 1994

NTSB Order No. EA-4075

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. REPHAEL BAEHR, Respondent.	Docket SE-11105

OPINION AND ORDER

Respondent, acting pro se, has appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis at the conclusion of a bifurcated hearing held in this matter on January 8, 1991 (in Lawndale, California) and August 27, 1991 (in Fairbanks, Alaska).[1] In that decision the law judge affirmed the Administrator's order suspending respondent's

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

airline transport pilot certificate for 60 days based on his alleged violations of 14 C.F.R. 91.9 and 91.67(a).[2] Those violations were premised on the following factual allegations, which the law judge found established:

> 2. On October 28, 1989, you operated Civil Aircraft N1134W, a Bell Helicopter Model [47J], as pilot-in-command, on a Visual Flight Rules (VFR) flight departing from the Santa Ynez Airport, Santa Ynez, California.
>
> 3. On the occasion of this flight, at about 1415 hours PST, you operated N1134W so as to take off from the northeast end of the airport and directly in front of an aircraft, a Mooney, N201P, [] on short final for landing on Runway 26.
>
> 4. The pilot of N201P was required to take evasive action to avoid a mid-air collision.
>
> 5. The Santa Ynez Airport is an uncontrolled airport. It had a Unicom frequency to assist pilots of aircraft operating at, and within the airport pattern areas.

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[2] Section 91.9 [now recodified as § 91.13(a)] provided:

> **§ 91.9 Careless or reckless operation.**
>
> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.67(a) [now recodified as § 91.113(b)] provided:

> **§ 91.67 Right-of-way rules: Except water operations.**
>
> (a) *General*. When weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft. When a rule of this section gives another aircraft the right-of-way, the pilot shall give way to that aircraft and may not pass over, under, or ahead of it unless well clear.

[Section 91.67(f) [now recodified as 91.113(g)] provided that landing aircraft have the right-of-way over other aircraft.]

6. The pilot of N201P announced his intentions as to the approach and landing he was about to make. Aircraft N1134W did not announce its intentions as to a takeoff.

7. Aircraft N201P, as the aircraft on final approach to land, had the right-of-way over N1134W, operated on the surface, in accordance with FAR Section 91.67(f).

On appeal, respondent contends that there was insufficient evidence to support the law judge's finding that he was the pilot in command of the offending helicopter, and that the law judge improperly relied on respondent's filing of a report under the Aviation Safety Reporting Program (ASRP) to find him guilty of the offense. Respondent also asserts that, due to various alleged improprieties on the part of the Administrator and the law judge, he was denied a fair hearing. Respondent asks us to reverse the initial decision, or in the alternative, to remand it for a rehearing before another law judge. As discussed below, we hold that respondent's arguments provide no basis for reversal or rehearing.[3]

Pilot identity. The pilot of the Mooney aircraft, Larry Evenson, testified that approximately 10-20 minutes after the incident he saw the same helicopter which had flown into his flight path return and land at the airport. (Tr. 37, 54, 56.) After respondent emerged from the helicopter, Mr. Evenson confronted him about the incident, asking whether respondent had seen him. Respondent answered that he had not. When Mr. Evenson

[3] Nor has respondent established the need for oral argument in this case. Accordingly, his request for oral argument is denied under 49 C.F.R. 821.48(g).

asked whether respondent had been monitoring the Unicom frequency, over which Mr. Evenson had several times announced his position during his approach and landing, respondent replied that he was not required to monitor that frequency as it was an uncontrolled airport.[4] (Tr. 39, 66-7.) At no time during his conversation with Mr. Evenson did respondent deny that he had been piloting the helicopter which flew in front of Evenson's aircraft.

Prior to confronting respondent, Mr. Evenson had reported the incident to the airport manager, Peter Cottle. Mr. Cottle, who did not witness the incident, knew that respondent's was the only helicopter that was operating out of the airport at that time, and he provided Mr. Evenson with respondent's name and aircraft registration number.[5] (Tr. 122, 154.) Mr. Cottle testified that he had seen respondent operate his helicopter earlier that day in the same takeoff pattern which led to the near-miss here at issue. (Tr. 153.) Mr. Cottle testified that when he spoke with respondent about the incident, respondent never denied operating the helicopter. (Tr. 132.) When he asked respondent whether the radio in his helicopter had been on, respondent stated that he was not required to have it on since it

[4] The testimony established that the Santa Ynez airport is heavily used on weekends (this incident occurred on a Saturday) and that, though not required by regulation, it is common for pilots there to use the Unicom frequency as a safety precaution. (Tr. 40-1, 47, 87, 104-5, 111, 117; see also Exhibit C-1.)

[5] Respondent was apparently operating sightseeing flights out of the Santa Ynez airport at the time. (Tr. 37, 123.)

was an uncontrolled airfield. (Tr. 124-5.)

Mr. Evenson, Mr. Cottle, and David Kay (a corporate pilot who was at the airport that day and witnessed the near-miss) all testified that there was only one helicopter flying at the airport that afternoon. (Tr. 82, 110, 122, 130; see also Tr. 170, 193.) According to FAA Inspector Robert Roehm, the type of helicopter flown by respondent -- the Bell 47J -- is somewhat rare and has an unusual configuration. (Tr. 205-6.) Indeed, Mr. Kay testified that the helicopter involved in the incident looked "different" from what he was accustomed to, and that its configuration was "strange." (Tr. 90.)

FAA Inspector Roehm, who investigated this incident, offered respondent the opportunity to submit "any evidence or statements" regarding the incident. (Exhibit C-3.) Respondent's sole reply was a written statement that, "[o]n October 28, 1989, I was not operating an aircraft that crossed the approach end of rwy. 26, in front of a landing aircraft." (Exhibit C-4.) Inspector Roehm testified that after speaking with all of the potential eyewitnesses identified by Mr. Cottle,[6] he concluded that

[6] Respondent complains that all of the witnesses in this case were identified by Mr. Cottle, who respondent asserts is a business competitor. We note, however, that respondent was given an opportunity to submit any information he deemed relevant, but elected not to participate in the FAA's investigation.

Respondent also challenges the Administrator's failure to call two additional (unnamed) witnesses who respondent alleges were closest to the scene of the incident and who, respondent inexplicably presumes (based on their absence from the Administrator's witness list), must have indicated to Mr. Cottle that respondent was not the pilot in command. Although Mr. Cottle testified that he spoke with two apparent witnesses who were present in the gliderport at the time of the incident (Tr.

respondent had in fact been the pilot in command of the offending aircraft. (Tr. 169-70, 193.)

Respondent offered no testimony or other evidence relating to the incident here at issue.[7] His entire presentation consisted of opening and closing argument.

Although the Administrator presented no direct evidence that respondent was the pilot in command of the helicopter which flew into the flight path of the Mooney aircraft on short final, the record contains abundant unrebutted circumstantial evidence from which this conclusion could clearly be inferred. We have previously recognized that pilot identity can be established by circumstantial evidence. Administrator v. King, 4 NTSB 1311, 1313 (1984). In King, we summarized the standard of proof required to prove pilot identity as follows:

> "[Since] evidence bearing on pilot identity questions is generally within the knowledge of respondent . . . circumstantial evidence that the respondent was in the plane, and the absence of any evidence that another passenger held a valid pilot's license . . . [is] sufficient to sustain a prima facie case. The burden of going forward with evidence to show that someone else acted as pilot then rests with the respondent. Administrator v. Starr, [3 NTSB 2962 (1980)]."

(..continued)
122), Inspector Roehm explained that, as it turned out, some of the potential witnesses named by Mr. Cottle had not actually seen the incident (Tr. 203), and that his investigation revealed only three eyewitnesses: Mr. Evenson, Mr. Kay, and Mr. Baker. We find no basis in this record for concluding that the recollections of the two (unnamed) individuals would have exculpated respondent.

[7] He offered two exhibits: a map of the airport (Exhibit R-1), and a form indicating that he passed a Part 135 proficiency check on February 8, 1990 (Exhibit R-2).

The law judge found, and we agree, that the Administrator made out a prima facie case, which stands unrebutted in the record, that respondent was the pilot in command of the helicopter that flew across the takeoff end of runway 26 in front of the Mooney on short final. (Tr. 313.)[8] Respondent's assertion that some of the evidence against him was hearsay provides no basis for reversal of the initial decision.[9] Nor does his suggestion that Mr. Cottle's testimony was colored by what respondent characterizes as "a long history of harassment and animosity" towards respondent (App. Br. 12), since the law judge was aware of respondent's position in this regard (Tr. 145-

[8] Respondent notes that the law judge said "respondent" had made out a prima facie case. However, it is obvious from the context of his discussion (he had just reviewed the Administrator's evidence), that the law judge clearly intended to state that the Administrator had made out a prima facie case.

[9] Respondent contends that the law judge accorded "undue weight" to the written statement of Mr. Baker (Exhibit C-2), and to the statements allegedly made by respondent to Mr. Evenson and Mr. Cottle. (App. Br. at 2.) However, respondent's statements to Mr. Evenson and Mr. Cottle (indicating that he did not see the aircraft and that he was not required to monitor the Unicom frequency), are not hearsay since they were not offered to prove the truth of those statements. Regarding Mr. Baker's written statement, the law judge explained to respondent that hearsay is admissible in Board proceedings, but that such a statement carries less weight than live testimony. (Tr. 43, 162-3). Furthermore, the law judge could not have relied on Mr. Baker's letter in concluding that respondent was the pilot in command, as Mr. Baker did not comment in his letter on the identity of the pilot.

6, 268).[10] In any event, the important points in Mr. Cottle's testimony, as we view it -- that respondent's was the only helicopter operating at the airport that afternoon, and that when confronted about the incident respondent stated he was not required to monitor the Unicom -- were independently corroborated by the testimony of other witnesses.

Finally, we find no indication in the record that the law judge improperly relied on respondent's filing of an ASRP report as proof that he piloted the offending helicopter. The basis for respondent's argument is the law judge's comment, interjected while respondent was cross-examining Inspector Roehm as to how he concluded that respondent was the pilot: "[a]re you really contesting that you weren't in this aircraft on the day in question? Because, if so, why did you bother to file a NASA report?" (Tr. 184.) The law judge then proceeded to summarize the evidence already presented and indicated his amazement that respondent was apparently taking the position that he was not in the helicopter. (Tr. 185-6.) Respondent indicated that he had

[10] As we said in Administrator v. Calavaero, Inc., 5 NTSB 1099, 1100 (1986):

> Our law judges have broad discretion to accept as a matter of credibility the testimony, self-serving or otherwise, of any witness over the testimony of any other witness or witnesses as to their factual observations. Consistent with that authority, so long as the interests and motivations which could influence or color a witness' testimony are reasonably apparent on the record, the law judge's credibility assessments, made within his exclusive province as trier of the facts, are presumed to reflect a proper balance of all relevant considerations, including witness demeanor, and will not be disturbed on appeal absent extraordinary circumstances not present in this case.

filed the report to protect himself in case of a future enforcement action, and proceeded to suggest two "possibilities" (but never presented any evidence to support either one) explaining how he might have become aware of the incident without being the offending pilot.[11]

It is clear to us that the law judge felt the Administrator's evidence, separate and apart from the ASRP report,[12] was sufficient to shift the burden to respondent to show that he was not the pilot in command. (Tr. 185-6, 195-6.) Furthermore, in his initial decision, the law judge based his findings wholly on the evidence and testimony of the witnesses, not on the respondent's ASRP filing. Thus, his question about respondent's reason for filing the report was, at most, harmless error.

Alleged misconduct by the Administrator and law judge. In his appeal brief, respondent sets forth a litany of alleged improprieties committed by both the Administrator and the law

[11] Respondent suggested that he might have been in the aircraft but not piloting it, or that he witnessed the incident from the ground. (Tr. 192.)

[12] It should be emphasized that the Administrator did not introduce the ASRP report into evidence or seek to rely on it in any way which would be contrary to 14 C.F.R 91.25 (which prohibits the Administrator from using ASRP reports in any enforcement action). Respondent himself entered it in the record when he attached it to his answer to the complaint. Moreover, respondent chose not to testify concerning his assertion that he submitted proof of his timely filing of the report only because counsel for the Administrator promised him at the informal conference that if he did so he would be granted immunity from sanction. Thus, the contention is unsubstantiated in the record.

judge in connection with this case, ranging from improper service[13] to law judge bias. We have reviewed the entire record in this case, and find no reversible error.

Respondent has failed to establish any bias or misconduct on the part of the law judge. In asserting that the law judge would not allow him to present witnesses and exhibits that would have exonerated him, respondent ignores the fact that no such witnesses or exhibits were proffered. Although the law judge scheduled the second session of the hearing in Fairbanks, Alaska, in order to accommodate respondent's stated intention of calling several purported eyewitnesses to the incident,[14] respondent called no witnesses (and did not testify himself) at the hearing. Contrary to respondent's contention that the law judge would not allow him to discredit the Administrator's witnesses (particularly Mr. Cottle), the law judge allowed respondent to

[13] Regarding respondent's claims of improper service, we find that he suffered no prejudice as a result of the Administrator's use of his old address to serve two discovery documents, as the discovery documents were apparently forwarded to his then-current address well before the scheduled hearing date. Nor was respondent prejudiced as a result of his non-receipt of two subpoenas which were mailed by the law judge's office to an incorrect address, since respondent was able to achieve his goal of interviewing the Administrator's prospective witness without the use of a subpoena. (Tr. 29-32.)

[14] Respondent represented during the first session of the hearing (on January 8, 1991, in Lawndale, California) that at the second session he would be calling several purported eyewitnesses, some of whom were currently living in Israel, but who were planning to be in Fairbanks in August. On August 2, 1991, respondent moved for an indefinite continuance of the second hearing session until such time as he was contacted by the potential witnesses in Israel, asserting that he was unable to reach them. The law judge denied the motion, reasonably, we think, finding no good cause for such a continuance.

question them at length, only prohibiting questions on clearly irrelevant matters. (See e.g., Tr. 142-5.)

Nor is there any support in the record for respondent's assertion that counsel for the Administrator and the law judge engaged in a prohibited ex parte conversation the day before the hearing. It appears that a conversation was held, but that only procedural matters were discussed.[15] The Board's rules prohibit only ex parte communications relevant to the merits of a proceeding. 48 C.F.R. 821.61(b).

Finally, respondent incorrectly asserts that the Administrator changed his characterization of respondent's conduct from "careless" to "reckless" to "intentional" during the course of these proceedings so as to render respondent ineligible for sanction immunity under the ASRP.[16] (App. Br. at 22.) He also contends that the law judge improperly found that his violation was intentional, when no such allegation was included in the complaint. The Administrator took the position throughout the hearing (though admittedly articulated it in various ways) that respondent was not entitled to immunity under the ASRP, because the sanction immunity provisions of that program extend only to violations that are shown to be "inadvertent and not

[15] The law judge indicated that he had spoken to counsel for the Administrator in an effort to clarify the respondent's correct address, and to determine whether the Administrator had received the ASRP filing attached to respondent's answer. (Tr. 5-6, 24.)

[16] The allegation in the Administrator's complaint that respondent violated section 91.9 in that his conduct was "careless or reckless" was never amended.

deliberate."[17] (Tr. 18-21, 250, 257.) In light of respondent's failure to introduce any evidence on this point we agree with the law judge's conclusion that respondent did not establish any entitlement to sanction immunity under the ASRP. Finally, we note that no allegation that the violation was deliberate or not inadvertent was required to be included in the complaint, since respondent's asserted entitlement to sanction immunity under the ASRP was an affirmative defense, as to which he had the burden of proof. Administrator v. Smith, 5 NTSB 1560, 1564 (1986).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 60-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[18]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[17] See Ferguson v. NTSB, 678 F.2d 821 (9th Cir. 1982).

[18] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).